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years it would be accepted by all the States seems likely soon to be accomplished. Its enactment in Michigan was due largely to the efforts of Mr. George W. Bates, of the Detroit Bar.

UNAUTHORIZED OPERATION BY PHYSICIAN.—A case of interest involving the question of a patient's consent to a surgical operation was recently before the Supreme Court of Minnesota, *Mohr v. Williams*, 104 N. W. Rep. 12. The defendant, a physician and surgeon of standing and character in the profession, who made the disorders of the ear a specialty, was consulted by the plaintiff for a trouble in her right ear. At her request, he made an examination of that organ for the purpose of ascertaining its condition. He informed the plaintiff of the result of the examination, and advised an operation. At the same time he made a partial examination of the left ear, but owing to the presence therein of foreign substances, did not attempt a diagnosis, and apparently offered no suggestions as to the course that should be taken in regard to that ear. The plaintiff, after consulting with her family physician and after one or two further consultations with the defendant, decided to submit to the operation that the defendant had advised. At this time she had not been informed that her left ear was in any way diseased and understood that the operation was to be confined to the right. After the patient was under the influence of the anaesthetic, the defendant made a thorough examination of the left ear and found its condition to be much more serious than that of the right ear. This was called to the attention of the family physician of the plaintiff, who was present at plaintiff's request, and who confirmed the diagnosis of the defendant. Upon a further examination of the right ear, it was found that its condition was less serious than the defendant had supposed, and he thereupon concluded to and did operate upon the left ear instead of the right, intending, after the operation, to give other treatment to the right ear. The operation, it appears, was performed with skill and was in every way successful. But it was claimed by the plaintiff that her hearing was impaired by the operation, and that, as it was done without her consent, it was wrongful and unlawful and constituted an assault and battery. The trial in the court below resulted in a verdict for the plaintiff of \$14,322.50. The defendant appealed from an order denying his motion for judgment notwithstanding the verdict, and the plaintiff from an order granting a new trial on the ground that the verdict was excessive. The Supreme Court sustained the trial court upon both contentions, holding in regard to the contention of the defendant that he was entitled to judgment notwithstanding the verdict that he had no authority to perform the operation without the consent of the plaintiff, either express or implied; that no express consent appearing, whether it should be implied from the circumstances of the case, was a question of fact for the jury; and that the operation was wrongful and unlawful, and constituted an assault and battery, if it was not authorized by the express or implied consent of the plaintiff.

The court was undoubtedly correct in its conclusions. Consent to a surgical operation is necessary. If not laboring under such disability as would make an intelligent consent impossible, it is for the patient to decide whether or not

the operation should be performed. The consent of the patient may be express, or it may be implied from circumstances connected with the case. Usually the question of implied consent is one of fact for the jury, but in some cases the court would hold as a matter of law that consent for the performance of a particular operation should be implied from the fact that the patient placed himself under the surgeon's care with a view of his performing the particular operation. The patient may, of course, leave it to the discretion of the surgeon to proceed as his judgment may dictate. Where the nature and extent of the operation cannot be fully determined by a preliminary examination, it is a wise precaution for the surgeon to have the scope of his authority fully settled in advance. He may properly refuse to operate unless unlimited discretion is given to him. Undoubtedly, if in the course of an operation, and when the patient is under the influence of the anaesthetic, unusual and unexpected conditions are found that, in the judgment of the surgeon, call for a more extended or a different operation than the one contemplated, and for which consent has been given, the surgeon would be justified in proceeding without express consent, if, in his judgment, a failure to do so would imperil the life of the patient or greatly endanger his health. The cases upon the subject are limited in number, but the foregoing suggestions find support in the opinion in the case under examination and in *State v. Housekeeper*, 70 Md. 162; *Pratt v. Davis* (Ill. App. Court), 37 Chicago Legal News, 213; *M'Clallen v. Adams*, 19 Pick 333.

The English *nisi prius* case of *Beatty v. Cullingworth*, noted with comments in 44 Cent. Law Journal 153, is of interest in this connection, although the doctrine of the case would not probably be generally followed in this country. The plaintiff therein, an unmarried woman, said to the surgeon who was about to perform upon her the operation of ovariotomy, that if he found both ovaries to be diseased, he must remove neither. To this he replied, "You must leave that to me," but the plaintiff denied hearing this reply. Both ovaries were removed, as both were found to be diseased. The defendant and his assistant both testified as to the necessity of the double operation. At the time of the operation, the plaintiff was engaged to be married, but upon learning as to the extent of the operation, she broke the engagement and later brought suit against the surgeon. Under a charge from the court that the plaintiff had tacitly consented to the operation, the jury found a verdict for the defendant. It would seem that, from the circumstances as developed upon the trial, the question of consent was one for the jury.

If the patient is unable, on account of bodily or mental infirmities, to give an intelligent consent, authority to perform the operation should be obtained from the person who is naturally or legally the guardian of the patient. Consent by the husband, for example, under such circumstances, to an operation upon the wife, or by a parent, to an operation upon a minor child, would undoubtedly protect the surgeon. But if the wife is able to give consent, there is no necessity of securing the consent of the husband. The surgeon, under such circumstances, will be protected by the consent of the wife. The husband, indeed, has no right to withhold his consent to a necessary surgical operation upon his wife to which she is willing to submit.

In State v. Housekeeper, 70 Md. 162, 169, in which the husband claimed that an operation was performed without his consent and that the surgeon was consequently liable, the court says: "If she consented to the operation the doctors were justified in performing it, if after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife, you shall die of the cancer; you cannot be cured, and a surgical operation affording only temporary relief, will result in useless expense. The husband has no power to withhold from his wife the medical assistance which her case might require." See, also, *M'Clallen v. Adams*, 19 Pick. 333, in which it was held that it was not necessary for the surgeon to give notice to the husband of his intention to perform upon the wife a dangerous operation, to which her assent could be presumed from the circumstances, where the husband had placed his wife under the care of the surgeon for medical and surgical treatment for a dangerous disease. It should be observed, however, that it is a wise precaution for the surgeon to secure the consent of both husband and wife before performing upon either a capital operation.

While the consent of the parents before operating upon a minor child should ordinarily be secured by the surgeon, it is probable that the consent of the child to a necessary operation, if of such age and understanding as to appreciate the situation and the nature of the operation, would protect the surgeon, although so far as the writer has observed, this question has not as yet been passed upon by a court of last resort.

H. B. H.

THE KANSAS OIL REFINERY BILL.—The case of *State ex rel. Coleman, Atty. Gen. v. Kelly* (1905),—Kan.—, 81 Pac. Rep. 450, in which the so-called "Kansas Oil Refinery Bill" was declared unconstitutional, contains perhaps more of interest for the historian and the economist than for the lawyer. This bill marked the culmination of the contest waged within the last year by the State of Kansas against the Standard Oil Company. The substance of the bill is indicated in its title, which is "An act to provide for branch penitentiary and oil refinery in connection therewith, the issuance of bonds for said purpose, and making an appropriation therefor, and for the payment of principal and interest on said bonds." (Laws 1905, p. 783, c. 478.) The warden of the penitentiary is empowered to secure a site for such branch penitentiary and oil refinery, and to construct, maintain and operate on such site an oil refinery as a department of the State Penitentiary, to furnish the requisite machinery and equipment and to market the products of said refinery. The warden is also authorized to employ convicts in the construction of the plant and in operating it when completed, and to provide "suitable and humane quarters" for housing, feeding and guarding such convicts. Lump sums are appropriated for these purposes, to be raised from the proceeds of state bonds, the issue and sale of which are duly authorized.

This case was a proceeding on the relation of the attorney general for a peremptory writ of mandamus to compel the warden and the state treasurer to issue the bonds and apply the proceeds as directed by said bill. The sole